SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-646

JOSEPHUS REYNOLDS, et al.,

Petitioners,

v.

ROBERT W. PASTER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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November 25, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. ____

Josephus Reynolds, et al.,

Petitioners

v.

Robert W. Paster, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners, Intervenor Defendants at trial, petitioned for a writ of certiorari to review the judgment of the Supreme Court of Missouri entered on July 30, 1974. The parties to this proceeding are: Mr. and Mrs. Josephus Reynolds, in their own behalf, and as parents and next of friend of Richard B., Mark S., Theresa M., JoAnne F., and Elizabeth Ann Reynolds, minors; Mr. and Mrs. Joseph Fine, in their own behalf and as parents and next of friend of Barry, Halbert, and Mike Fine, minors; Mr. and Mrs. Ferol Thaemart, in their own behalf and as parents and next of friends of Angela Thaemart, minor; Mr. and Mrs. Lawrence Lage, in their own behalf and as parents and next of friends

of Debbie, Marie, Diane, Betty, James, Carolyn, Andrew, and Alice Lage, minors; Mr. and Mrs. Thomas Tobin, in their own behalf and as parents and next of friends of Thomas C., Martha M., Sandra C., James A., Daniel F., and Joseph P. Tobin, minors; Mr. and Mrs. Kenneth Meng, in their own behalf and as parents and next of friends of Linda and Janet Meng, minors; Mr. and Mrs. Edward Bakalar, in their own behalf and as parents and next of friends of Mary, Betty, Anthony, and Lori Bakalar, minors; Mr. and Mrs. Arthur J. Conley, in their own behalf and as parents and next of friends of Mark and Patricia Conley, minors; Mr. and Mrs. Harold Maurer, in their own behalf and as parents and next of friends of Thomas, Arthur, Susan, and Joseph Maurer, minors; Mr. and Mrs. William Backes, in their own behalf and as parents and next of friends of Leon, Ronald, Kenneth, Linda, Douglas, Norma, and Wanda Backes, minors; Petitioners.

Robert W. Paster, a minor, by and through his next of friend, Phillip J. Paster, and James M. Hornback, a minor, by and through his next of friend, James F. Hornback, Respondents; and C. Ed Tussey, F. Eugene Pennington, Henry E. Oppenheimer, Sanford J. Zimmerman, Charles F. Hamilton, Louis Fernandez, Frederic E. Busse, James L. Cummings, Garnell L. DeRamus, Andrew M. Doyle, Rosalind Harris, James E. Hurt, Jr., Malcolm W. Martin, Elmer W. Pounds, Ruth B. Scheetz, Daniel L. Schlafly, Wallace D. Schoenbeck, and Adella T. Smiley, Respondents; and John C. Danforth, Attorney General of Missouri, Respondent.

OPINIONS BELOW

The trial court opinion is not reported but is set forth as Appendix A (Pages A1-A24).

The Opinion of the Supreme Court of Missouri, is reported at 512 S.W. 2d 97, and also is set forth here as Appendix B (pages A25-A62). The Final Decree of the Circuit Court of St Louis County entered pursuant to the Opinion of the Supreme Court of Missouri, is not reported but is set forth as Appendix D (pages A64-A70).

JURISDICTION

The judgment of the Supreme Court of Missouri was issued on July 30, 1974. A timely motion for rehearing was filed which motion was denied by the Supreme Court of Missouri on August 26, 1974, (Appendix C, p. A63). The jurisdiction of this Court is invoked under 28 USC 1257(3) and 28 USC 2101 (c).

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether Article IX, Section 8, of the Missouri Constitution, as applied by the state court in this case, to an Allen-type general secular textbook loan law, so as to withdraw textbooks solely from children attending church-related schools while providing textbooks to all children attending public and non-sectarian, private schools violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment by establishing an invidiously discriminatory classification based upon the exercise of religion and the association with a church-related school.

2. Whether the state's action of withdrawing secular textbook loans solely because of the individual recipient's association (not government's action) with a church-related school is an infringement of petitioners right to freely exercise their religion and freedom of association as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment which state in pertinent parts as follows:

> AMENDMENT I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"
>
> AMENDMENT XIV, Section 1: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provision of the Constitution of Missouri is Article IX, Section 8, which reads as follows:

> "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary,

college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

The Missouri Textbook Law, Section 170.051, RSMo. Supp. 1973 (Senate Bill 638, 76th General Assembly), reads as follows:

"1. As used in this Section, the following terms shall have the meaning indicated unless the context otherwise requires:

(1) "Textbook", means workbooks, manuals, or other books, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

(2) "School", means any elementary or secondary school, public or nonpublic, nonprofit, within this state, and wherein a resident of the state may legally fulfill the compulsory school attendance school requirements of section 167.031, RSMo.

2. Each public school board shall

purchase and loan free all textbooks for all children who reside in the district and attend an elementary or secondary school in this state.

3. Textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended.

4. Title to and control and administration of the use of all textbooks purchased under this section shall be vested in the public school board and shall be loaned free to pupils and teachers upon their request. The public school board may prescribe rules and regulations governing the loaning of textbooks.

5. No school board shall be required to purchase textbooks to be lent under the provisions of this act from sources of revenue other than the free textbook fund, except that in addition to the textbooks purchased under this act, a school board may purchase from its incidental fund texts, supplementary texts, library and reference books and instruction supplies, for the use of pupils attending public schools only. In the event that the money from the free textbook fund is insufficient to purchase textbooks for all elementary and secondary pupils, then priority shall be given to elementary pupils.

6. Only textbooks which are filed with the state board of education pursuant to section 170.061, RSMo, shall be purchased and loaned under this section. No textbooks shall be purchased or loaned under this section to be used in any form of religious instruction or worship.

7. Textbooks shall be purchased from the free textbook fund. No portion of the public school fund referred to in section 5, article IX constitution of this State shall be used to pay this cost of textbooks under this section nor shall funds under this section be in any way commingled with the public school fund."

STATEMENT OF THE CASE

The Missouri Legislature, by a resounding vote in each house, enacted an Allen-type program lending secular textbooks to all (both public and private school) children expressly declaring that "textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended." Section 170.051-3, RSMo. Supp. 1973. All children were counted in the apportionment of funds for the program.

The state court applied the "child benefit" theory and did not find that the textbook program aided churches or church-related schools but, based solely on the grounds that children attending church-related schools as individuals promoted a sectarian purpose by merely attending a church-related school, the state courts enjoined the lending of textbooks to children attending church-related schools while continuing the lending of textbooks to children attending public schools or non-sectarian, private schools.

THE PARTIES: Petitioners are members of a class of children who attend church-related and non-sectarian schools in the State of Missouri and their parents. They were designated Intervenor Defendants in the trial court. Petitioners attend Jewish, Protestant, and Catholic schools at varying locations throughout the State. Some attend inner city schools, with significant Black enrollment, some

attend suburban and others small rural schools. Prior to enactment of the 1974 textbook statute, all petitioners paid for their own textbooks. Some petitioners send their children to church-related schools "in the exercise of their religious convictions."

Respondents, Paster and Hornback, are children enrolled in public schools in Missouri and their parents who challenged the constitutionality of the textbook law. They were Plaintiffs in the trial court.

The Defendants Tussey, Pennington, Oppenheimer, Zimmerman, Hamilton, and Fernandez are members of the Board of Education of Ladue School District and the Defendants Busse, Cummings, DeRamus, Doyle, Harris, Hurt, Martin, Pounds, Scheetz, Schlafly, Schoenbeck, and Smiley are members of the Board of Education of the City of St. Louis in Missouri and were Defendants in the trial court.

Respondent John C. Danforth is the Attorney General of Missouri and was an Intervenor Defendant in the trial court.

THE PROCEEDINGS BELOW: The trial court (the Circuit Court of St. Louis County) upheld the Missouri Textbook Act Section 170.051, RSMo Supp. 1973, under both federal and state constitutions with the exception of the provision for lending textbooks to public and private school teachers. The trial court filed an opinion entitled "Court's Memorandum of Law" which is unreported. The opinion is set out as Appendix A, pages A1 to

A24. An evidentiary hearing was held. The trial court said, "Senate Bill 638 (§170.051, RSMo. Supp. 1973) is clearly intended to aid school children and not their schools.... Our findings and conclusions (are) that the Bill has a larger public purpose derived from the police power to advance the general welfare by helping educate all children on an equitable, non-discriminatory basis...." (Emphasis original, parens. added) (Appendix A, p. A19.) Stay requests were denied and the program went into full operation for over two years.

On appeal, although the Missouri Supreme Court did not find error in the trial court's findings and applied the "pupil-parent benefit" theory, it reversed the trial court. The State Supreme Court stated the question for decision was as follows: "Is the expenditure of funds to the pupil-parent in aid of a sectarian purpose?" (Appendix B, p. A44.) The court answered that question by stating, "Individuals, acting individually or collectively, can have and promote a sectarian purpose, and by attending a private school designed for such a purpose do, in fact, promote the sectarian objectives for which Article IX, Section 8 prohibits the expenditure of any public funds." (Appendix B, pp. A44-45.) The State Supreme Court based its decision solely on its interpretation and application of Article IX, Section 8 of the Missouri Constitution.

On remand, the trial court entered an injunction pursuant to the State Supreme Court's decision. The decree declares the portions of Section 170.051, RSMo. Supp. 1973, regarding the lending

of textbooks to pupils attending private schools to be in violation of Article IX, Section 8 of the Missouri Constitution "insofar as they relate to pupils attending schools controlled by any religious creed, church, or sectarian denomination whatever." (Appendix D, p. A67.) Public boards of education were permanently enjoined from lending textbooks "to pupils or teachers of the sectarian, church-related or religion-oriented classes." (Appendix D, p. A67.)

THE FEDERAL CONSTITUTIONAL ISSUES WERE TIMELY RAISED. The trial court upheld the Missouri textbook statute under both state and federal constitutions. Although the trial court, in its opinion, alluded to the Free Exercise issue (Appendix A, pp. A8-9), since it upheld the state statute there was no need for a decision of other issues. The federal constitutional issues which are raised in this Petition for Writ of Certiorari only emerged fully when the Supreme Court of Missouri issued its opinion of July 30, 1974. It is the State Supreme Court's application of Article IX, Section 8 of the Missouri Constitution which creates the federal constitutional issues. Petitioners filed a motion for rehearing with the State Supreme Court and presented the federal constitutional issues now addressed to this court. The state court denied the motion for rehearing (Appendix C, p. A63). Thus, the federal constitutional issues have been timely raised to the state courts.

REASONS FOR GRANTING THE WRIT

A. UNSETTLED FEDERAL QUESTIONS SHOULD BE CLARIFIED.

The matters raised by Petitioners present substantial federal questions which are presently unsettled. Certiorari should be granted so that this court can give guidance to the states.

In Everson v. Board of Education, 330 U.S. 1 (1947), this court intimated that there was a neutral zone between the requirements of the Establishment Clause and the commands of the Free Exercise Clause. In this zone, it would be permissible for states to provide benefits to children attending church-related schools, but not mandatory. This Court has asserted that the state is not required to extend equal services to children attending public and nonpublic schools. But, once it has provided assistance to all children, it is not free to withdraw these benefits on the basis of religion. Nor is it free arbitrarily to cut off benefits on the basis of institutional association.

This court has given plenary consideration to numerous cases which define the limits of the Establishment Clause. However, no case has given full consideration and clarification as to the Free Exercise boundary of the neutral zone nor the Equal Protection requirements within the zone.

The Free Exercise issue was raised in Brusca v. Missouri, 332 F. Supp. 275 (EDMo. 1971), affirmed without opinion,405

U.S. 1050 (1972), and Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (WD Mo. 1973), affirmed without opinion, ____ U.S. ____, 43 LW 3230, (October 21, 1974). In neither of those cases were the issues concretely framed as they are here. In neither case was there an actual statute for review. Brusca presented an abstract claim that the plaintiffs were entitled to state aid for the purpose of enabling them to give their children an adequate religious education in sectarian schools. Brusca, supra, 278. The claim of the plaintiffs of the Establishment Clause. In Luetkemeyer, the plaintiff claimed that the State Legislature must enact a pupil transportation law which would include private as well as public school children.

The case here is different. The Missouri Legislature has enacted a textbook law and expressly declared that all children should benefit equitably and without discrimination in the program. Unlike Brusca and Luetkemeyer, here we are dealing with the withdrawal of legislatively granted services.

This court summarily disposed of Brusca and Luetkemeyer. Thus they are a very limited guidance to the states as they deal with the complex problems of preserving Free Exercise while avoiding Establishment. Edelman v. Jordan, ___, U.S. ___, 94 S. Ct. 1347, 1359-60 (1974).

This case is not controlled by Norwood v. Harrison, 413 U.S. 455 (1973). The state has a duty to be hostile to racial discrimination. However it's duty towards religion is to be neutral. "...the constitution...places no value

on (racial) discrimination as it does on the values inherent in the Free Exercise Clause." (parenthesis added.) Norwood, supra, pp. 469-470. We note that the writer of the Norwood opinion did not consider it dispositive of the issue presented in Luetkemeyer. A fortiorari, it is not dispositive of the issues here. Luetkemeyer, ___ U.S. ___, 43 LW 3230, (Dissenting Opinion).

This court should grant Certiorari to clarify the serious, unsettled questions that have arisen as to how far a state may go in prohibiting that which is permissible under the Establishment Clause before it infringes the Free Exercise Clause and as to whether a state may withdraw granted benefits, permissible under the Establishment Clause, on the basis of religion or association with church-related institutions.

B. DENIAL OF EQUAL PROTECTION:

The State may not "invidiously" discriminate in classifying persons for participation in a public program. There must be a reasonable basis if differing treatment is given those similarly situated. Where a fundamental right is burdened, a stricter standard applies. Such classifications are "closely scrutinized" and Equal Protection is violated unless there is a "compelling state interest" which justifies the classification and the state has no alternative means to attain its ends which do not burden rights. Shapiro v. Thompson, 394 U.S. 618 (1969); West Va. State Board of

Education v. Barnette, 319 U.S. 624 (1943).

Free Exercise of Religion is a fundamental right. "...only those interests of the highest order and those not otherwise served can overbalance the legitimate claims to the Free Exercise of Religion." Wisconsin v. Yoder, 406 U.S. 205, 215; also see: Sherbert v. Verner, 374 U.S. 398 (1963). The evidence here is that some Petitioners chose church-related schools "in the exercise of their religious convictions." (Transcript on Appeal, Vol. II, pp. 217 and 246.)

Freedom of Association is also a fundamental right. "It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958), NAACP v. Button, 371 U.S. 415, 444 (1963).

The Missouri Legislature tried to treat all school children equally. The Textbook Act expressly declared that children should be treated "on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended."

Section 170.051-3, RSMo. Supp. 1973. However, the state court pruned the universal program of the legislature by eliminating one class of children; namely, those who attend church-related schools. Children in public schools receive textbooks; children in non-sectarian private schools receive textbooks; children in church-related private schools are barred. The classification is based solely on the Petitioner's exercise of their religion and their association with church-related schools.

What compelling interest does Missouri assert in defense of its infringement of religion and freedom of association?

No claim is made that public funds must be conserved for public schools. Children of non-sectarian, nonpublic schools are eligible. And the evidence is that there are ample funds available to buy textbooks for all children. (Intervenor Defendants Exhibit No. 3.)

No claim is made that the program violates the Establishment Clause. It passes secular purpose, effect, and non-entanglement tests. Board of Education v. Allen, 392 U.S. 236 (1968), disposes of this issue and the state court does not dispute this.

In defense of its withdrawing of textbooks from children attending church-related schools, Missouri claims a policy of separation of church and state that is "more restrictive" than the Establishment Clause (Appendix B, p. A37). However, Missouri's "more restrictive" policy is

not the application of reason to the complex task of preserving individual rights as well as the separation of church and state but the arbitrary exercise of judicial fiat.

An evidentiary hearing was held in this case. The courts did not find that the state law provided textbooks of a religious nature. The books were genuinely secular. They were not diverted for religious use. The court did not find that the providing of textbooks supplanted resources of church-related schools (the uncontroverted evidence is that private schools in Missouri do not buy textbooks; they are purchased by the parents or the child). The court did not find that government action resulted in aid to religion; it applied the "child benefit" theory. The sole basis for the court's withdrawing of textbooks from children attending church-related schools is the conclusion of the court that the individual students, by their mere attendance of a church-related school, promoted a sectarian purpose.

Having undertaken a program of lending textbooks to all children, the state cannot exclude individuals "because of their faith or lack of it, from receiving the benefits of public welfare legislation." Everson v. Board of Education, 330 U.S. 1, 16 (1947).

The state court here arbitrarily created a minority class, i.e. those children who select church-related private schools, and without any reasonable relationship to the state's interest, withdrew public benfits from such children.

It is submitted that there is no legitimate state interest in penalizing an individual because of his association with religious institutions. On the contrary, such state action is an impermissible violation of Free Exercise of Religion and of Freedom of Association (Further see: Point C).

The state has alternative means of achieving its policy without infringing fundamental rights; namely, through "cautiously delineated" statutes. However, the Missouri court did not say that all children may borrow textbooks so long as religion is not aided. It did not allow the legislature any "play in the joints" to work out a sound and reasonable program. The court's application of the state constitution simply places an absolute barrier to participation by the minority of children. To place special obstacles in the path of minorities which deny them public benefits and rights is not permissible. Hunter v. Erikson, 393 U.S. 385 (1969); Nyquist v. Lee, 318 F. Supp. 710, affirmed without opinion, 402 U.S. 935 (1971).

By withdrawing textbooks, the Supreme Court of Missouri has denied Petitioners the right to Due Process and Equal Protection and have imposed a heavy burden on the Free Exercise of Religion and Freedom of Association which is neither warranted nor justified by the need to keep church and state separate.

C. THE STATE COURTS DECISION SETS A PRECEDENT WHICH THREATENS THE FREE EXERCISE OF RELIGION AND FREEDOM OF ASSOCIATION OF ALL PERSONS.

The state court said, "Obviously if the expenditures called for in Section 170.051 were considered as an aid of a church, this section (Article IX, Section 8 of the Missouri Constitution) as well as others herein quoted from the Missouri Constitution, would make this statute unconstitutional." The state court did not conclude that the textbook program was in aid of a church, but went on to state that, "for the purposes of this case, we have applied the 'pupil-parent benefit' theory...to the statute and Article IX, Section 8." The state court opinion goes on to pose this question, "Is the expenditure of funds to the pupil-parent in aid of a sectarian purpose?" (Appendix B, p. A44.) (More accurately here the question should be: Is the lending of secular textbooks to the pupil-parent in aid of a sectarian purpose? Neither the pupil nor the parent receive any funds. Funds are distributed exclusively to public agencies.) The state court concluded that an individual, by attending a church-related school, does, by that very fact, promote a sectarian objective. Based on this reasoning, the state court concluded that the lending of textbooks to pupils attending church-related schools is in violation of Article IX, Section 8 of the Missouri Constitution.

The state court held that an individual is constitutionally prohibited from receiving a public benefit if the individu-

al also pursues a sectarian purpose or associates with those who do. This is a radical and heretofore unenunciated principle. If this is the rule of law to be applied, virtually every governmental service and benefit could be withheld from those citizens who associate with a church-related institution.

We do not assert that the receipt of a benefit by a pupil or parent insulates a law from constitutional prohibitions, where the individual is merely a conduit for aiding religion. E.g. Committee v. Nyquist, 413 U.S. 756 (1973), Sloan v. Lemon, 413 U.S. 825 (1973). On the other hand, what the state court here has done is to rule that a child's attending a church-related school taints an otherwise legal relationship between the child and a public benefit.

Parenthetically, it should be noted that Missouri's "guilt by association" rule extends beyond religion. Numerous children who attend church-related schools are not of the same faith as the sponsor of the school. For example, the evidence in this case is that over 50% of the children attending Central Catholic School (where some of the Petitioners attend) are not Catholics. (Transcript on Appeal, Vol.II, p. 64.) Private school pupils, like private schools, "are not fungible." Norwood v. Harrison, 413 U.S. 455, 471 (1973). Although an Agnostic, Protestant, or Jew does not attend a Catholic school to promote religion, his mere association with a church-related school is the basis for Missouri's taking away his textbooks.

If a child's association with a church-related institution taints this public benefit, then why would it not taint all? Such an extreme rule of law is beyond the state's interest and places the state beyond neutrality and makes it the adversary of religion. By so doing, the Missouri has infringed the Free Exercise of Religion and Freedom of Association of petitioners.

CONCLUSION

Petitioners submit that for the reasons aforesaid, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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November 25, 1974

APPENDIX A

IN THE CIRCUIT COURT OF
THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

ROBERT W. PASTER, et al,	)	
	)	
Plaintiffs	)	
	)	Cause No.
v.	)	333944
	)	Division
C. ED TUSSEY, et al,	)	No. 16
	)	
Defendants	)	

COURT'S MEMORANDUM OF LAW

This case fairly bristles with grave and interesting legal issues. It will be impossible to cover all of them in detail, since the parties are eager to carry this cause to a final judgment on appeal.

After cutting through a thicket of procedural problems dealing with class actions, standing to sue or to raise issues of unconstitutionality, etc., we reached the salient questions of the validity of Senate Bill 638 which its proponents have christened (if we may use that word) with the euphemistic title of the "Fair Textbook Law". We find that the Bill, except for one small part, survives its bombardment by sections of the federal and state constitutions. Our decree, filed this date, so declares, though we also issue a limited injunction prohibiting only the loan of textbooks to teachers.

Senate Bill 638

The Senate Committee Substitute for Senate Bill 638, herein referred to as Senate Bill 638, was passed by the 76th General Assembly with a resounding vote of approval, about 3 to 1 in the Missouri Senate and 2 to 1 in the House. It became law on August 13, 1972, but will have no significant implementation until the middle of October, 1972, when funds from which the books covered in the Bill will be purchased will be made available to the various school districts.

A copy of the Bill is attached to this memorandum. Underlining has been added to bring out certain of its important features. The old law allowed the loan of books only to pupils of public schools, and, for the most part, favored elementary grade students. The new law requires textbooks to be loaned to elementary and high school students and teachers in public and non-public schools on an equitable and non-discriminatory basis. "No textbooks shall be purchased or loaned under this section to be used in any form of religious instruction or worship." Most important of all, for the purpose of considering the restrictions of the Missouri constitution, no textbooks for loan to students in non-public schools can be purchased from any other source except the free textbook fund which is derived from premium taxes assessed against foreign insurance companies under Section 148.340-148.360. The Bill provides that "no portion of the public school fund referred to in section 5, Article IX of the

Missouri constitution shall be used to pay the costs of textbooks" purchased under the Bill, "nor shall funds under this section be in any way commingled with the public school fund".

(Parts II and III deal with standing of the parties and are omitted here for brevity.)

IV

A. Senate Bill 638 does not violate the Establishment of Religion Clause of the First and Fourteenth Amendments to the federal constitution insofar as it provides for the loan of textbooks to pupils of public and non-public schools.

B. Senate Bill 638 is not unconstitutionally void for vagueness or an unlawful delegation of legislative powers.

C. Senate Bill 638 is void to the extent that it requires the loan of textbooks to teachers in religiously oriented, private schools since it then offends against the Religion Clauses of federal and state constitutions.

D. The invalid provisions of Senate Bill 638 requiring the loan of textbooks to teachers in sectarian schools are severable from those valid portions of the Bill requiring loans of textbooks to students. However, the severance of the invalid portions of the Bill will require excision of provisions for loans of textbooks to teachers in public and non-public secular schools.

In upholding a state statute that reimbursed the parents of parochial school children for bus transportation expenses, Mr. Justice Black, for the majority, suggested that the decision approached the "verge" of a state's constitutional power to legislate in areas adjacent to territory forbidden by the Establishment Clause. Everson v. Board of Education, 330 U.S.1, 67 S. Ct. 564, 91 L.Ed. 711 (1947). Twenty years later the Court found itself at the very brink of state power when it found the New York textbook law to be constitutional. Board of Education v Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968). On June 28, 1971, the Court pulled Pennsylvania and Rhode Island back from the edge of the precipice while it cast over into darkness their laws giving direct-aid-to-teachers in church-related elementary or secondary schools. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed 2d 745 (1971). But, on the very same day, an almost unanimous Court found that the federal Higher Education Facilities Act of 1963, which allowed federal aid to church-related colleges, by way of construction grants for buildings to be used for secular educational purposes, was on firm ground.

Mr. Chief Justice Burger could well say in Lemon:

> "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."

But legislators must not be so frightened by over-warning into shrinking back

too far from difficult and possibly void enactments in the public welfare. When they do, they leave fallow a fertile field of legislation which may sorely need seeding. It is this tension between peril and safety, life and death, the valid and the void, that brings about evolution in the law.

The three main evils against which the Establishment Clause of the First Amendment was intended to guard are "sponsorship, financial support, and active involvement of the sovereign in religious activity". Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed 2d 697 (1970). These evils have given rise to three criteria: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion'". Lemon v. Kurtzman, supra. We turn now to applying these constitutional calipers to Senate Bill 638.

Secular Legislative purpose.

The thrust of plaintiffs' argument here is that the loaning of textbooks to students is but a transparent subterfuge for supporting, aiding and encouraging religious institutions by the use of public funds. Senate Bill 638 has no preamble declaring its purpose. There is before this court no evidence that the Missouri legislature was engaged in any dark, thinly-veiled conspiracy to advance the cause of any religion. A contrary intent is written all over the challenged Bill.

In 1930, the United States Supreme Court, in a unanimous opinion written by Mr. Justice Hughes in Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913, upheld a Louiaiana statute which allocated public funds for the free loan of textbooks to children attending private or non-private, sectarian or non-sectarian schools in the state. The Court said:

> "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate public schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Over 25 years ago, a New Jersey township board of education authorized reimbursement to parents of money expended by them for bus transportation. Some of the money was expended for transporting some children in the community to Catholic parochial schools. All of this was done under a New Jersey statute which authorized the board to make rules and contracts for the transportation of children to and from schools. The highest appellate court in New Jersey upheld the statute and board resolution against contentions of conflict with federal and state constitutions. The United States Supreme Court affirmed. Everson v. Board of Education, 330 U.S.1,

67 S.Ct. 504, 91 L.Ed. 711 (1947). Citing the Cochran case and others, Mr. Justice Black said: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." Parents in New Jersey, as well as in Missouri, may send their children to private schools, including parochial systems, if the school meets the secular requirements which the state has power to impose. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. Under the New Jersey statute, or under Senate Bill 638, the state contributed no money to the schools. The New Jersey Act merely provided "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools", including sectarian ones.

When the Supreme Court came to consider the New York Textbook Law in Board of Education v. Allen, supra, it had before it a seasoned line of precedents giving recognition to the fact that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience". Therefore, said the Court in that case:

> "Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This

judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

We have no difficulty, then, in concluding that there was a legitimate secular purpose in the enactment of Senate Bill 638. However, the words of Mr. Justice White in Allen, supra, while reassuring as to purpose, do not satisfy the second test proposed as to constitutionality under the Establishment Clause to which we now revert. Carried to its logical extreme, the "secular purpose" test when considered alone would permit direct financial aid to church-created and dominated private schools! We come, then, to the second test.

A primary effect which neither advances nor inhibits religion.

The key words here are "primary" and "effect"--the clause "primary effect". Plaintiffs have little to say about "primary effect". Given proper approval of purely secular textbooks on the basic subjects of methematics, English and so on, the only possible effect in advancing religion by the loan of such books would be some additional financial encouragement to attend private parochial schools rather than free public schools. But that argument proves too much. If the loan of textbooks to public school students and the withholding of such loaned books from private school students (the law before Senate Bill 638 was passed), then the necessitous few who would stay in private schools if books were loaned to them are being driven by a cruel fi-

nancial lack away from schools of their choice. In other words, if Senate Bill 638 in some way "advances" religion, the repealed statute inhibited it and both laws would be unconstitutional!

One of the effects of Senate Bill 638 will be to put the children of those too poor to buy textbooks on a parity with the children of those who can afford to buy textbooks if they go to private schools. But the true "primary effect" of the Bill will be an equitable and non-discriminatory enlargement of the class of children who need financial assistance in order to continue their education. If Missouri can help educate 1,000 needy children in the inner cities of St. Louis and even St. Louis County, it is of no significance to public welfare that a few children of the affluent classes benefit also. That is not to say that the free textbooks program is a dole; on the contrary, the rich as well as the poor will share the same privileges just as they may, as Anatole France once put it, both sleep, without discrimination, under railroad bridges.

One may add the observation often made that public statutes are not to be struck down as unconstitutional merely because there is, with the primary effect, some incidental private or religious benefit. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion". Tilton v. Richardson, supra.

Again, it is clear beyond doubt that the primary effect of Senate Bill 638 does not advance religion.

Board of Education v. Allen, 392 U.S. 236, 88 S.Ct., 1923, 20 L.Ed. 2d 1060, decided in 1968, is decisive and controlling upon the validity of the loan of textbooks to pupils, so far as the Establishment Clause of the federal constitution is concerned. There, the Court divided 6 to 3 in upholding a New York statute which authorized the use of public funds to purchase textbooks for free loan to school children in public or private schools which complied with the compulsory (sic) education law. Except for a few differences of no vital significance (other than loan to teachers under Senate Bill 638) and except for the carefully drawn funding provisions of Senate Bill 638, the Missouri law parallels the New York law.

The three dissenters in Allen, Black, Douglas and Fortas, ff., "focused primarily on their disagreement with the Court that the textbooks provided would be secular". Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed 2d 745, 780, footnote 12 to the opinion of Brennan, J., concurring in part. But, contrary to the opinions of the dissenters in Allen, the New York law permitted the loan of only those textbooks that the public school authorities had approved. No similar explicit provision for approval is contained in Senate Bill 638. Section 6 of the Bill provides that "only textbooks which are filed with the state board of education pursuant to section 170.061, RSMo., shall be purchased and loaned under this section". But Section 170.061, while it provides for the filing of textbooks which publishers propose to sell to school districts does not require their "approval" by anyone.

Therefore the plaintiffs have argued that Senate Bill 638 is more offensive from an Establishment of Religion standpoint than the New York law upheld in Allen. They point out that textbooks must be loaned to students "upon their request", and that the Bill defines a "textbook" to mean any book "expected to be available for the individual use of each pupil" in public or non-public schools. It is then argued that religious schools will "expect" religion-oriented books to be available and that school boards will be asked, if not required, to supply such books to pupils "upon their request". However, this argument overlooks the fact that it is the clear intention that only secular books shall be purchased and loaned. The Bill specifically provides that "no textbooks shall be purchased or loaned under this section to be used in any form of religious instruction or worship". We have more than one provision of our Missouri constitution prohibiting state aid of any kind for the advancement of any religion. See Article I, Sections 6 and 7; Article IX, Section 8. Public officials must be presumed to obey the law; there is no basis in law and none in fact in the record in this case for an assumption to the contrary.

Under the law in existence before Senate Bill 638 was passed school boards were required to make the same decisions. As the United States Supreme Court noted in Allen:

> "Without evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to dis-

tinguish between secular and religious books or that they will not honestly discharge their duties under the law."

If the bare possibility of abuse or disregard of public duty could invalidate laws, few would survive.

"Excessive entanglement" with religion.

The phrase stems from the recent opinion in Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 687 (1970). In later cases the Supreme Court has made it clear that it is impossible to avoid necessary and, we add, even desirable contacts between religious institutions and government. Total separation of church and state is not possible in the absolute sense. What must be avoided is a line of continuous intrusion by one into the affairs of the other. Without that restraint, the one may tend to control the other. Though most of us think of the historical tragedies where religion has dominated the state, equally to be feared is state control over separate sects. In our own times we have too often seen that the helping hand of government, in the form of grants, subsidies and welfare, is often extended only conditionally. These conditions often include the right of government to a voice in matters of policy. Not unheard of are exactions which demand the sacrifice of a constitutional right in exchange for financial aid. Americans must continually guard against selling their heritage of freedom to satisfy a hunger either for necessities or luxuries.

Fortunately, we find in Senate Bill 638 no hint that either government will dominate or intrude into sectarian fields or that religious organizations will trespass upon the state's provinces.

We are yet left with deciding whether "entanglement" is promoted by Senate Bill 638 and, if so, whether it is "excessive". It is not too easy to understand the concept, let alone apply it! The same Supreme Court which created the test of "excessive entanglement" said, in Lemon v. Kurtzman, supra:

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

We remind ourselves once more that the failure of the law to mark off prohibited territory with a bright, clear line should have no chilling effect upon those legislatures which have not only a right but a duty to exercise all of their powers to the fullest extreme, if necessary, in the public interest. Excessive timidity is as great an evil as excessive entanglement.

Reverting to Lemon v. Kurtzman, supra, decided by the United States Supreme Court in 1971, the Court there, with very little dissent, overturned statutes of Pennsylvania and Rhode Island. The first reimbursed non-public schools for the cost of teachers' salaries, textbooks and instructional materials in specified subjects. The Rhode Island statute required

the state to make direct payments to teachers in non-public elementary schools as a supplement to their annual salaries. The Court found that "both statutes foster an impermissible degree of entanglement", chiefly because "a comprehensive, discriminatory, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected". The Allen case was distinguished because "in terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not". The selection of textbooks to be placed on an approved list requires little or no inspection, and the job is a "one-shot" affair.

For these reasons we reject the contentions of plaintiffs that the statute here reviewed involves prohibited "excessive entanglement", and, for somewhat similar reasons, the contentions of the Ladue defendants that the Bill is void-for-vagueness or an unconstitutional delegation of legislative power.

However, under the holding in the Lemon case above, we are forced to conclude that those provisions of Senate Bill 638 requiring the loan of textbooks to teachers impinges upon the constitutional guarantees of the Establishment Clause of the First Amendment, made applicable to the states via the Fourteenth Amendment.

This does not mean that the entire Bill must fall. "The cardinal principle of statutory construction is to save and not to destroy". NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615,

81 L.Ed. 893. The rule repeatedly followed in Missouri is that the unconstitutionality of a part of an Act does not necessarily defeat the remaining provisions. "The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptable of constitutional enforcement is left, which the Legislature would have enacted if it had known that the excised portions were invalid". State ex rel. Enright v. Connett, Mo., 475 S.W. 2d 78. The Supreme Court of the United States recently applied the same test to a federal statute, part of which it declared invalid because of its trespass on the Religious Clauses of the First Amendment. Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed. 2d 790 (1971). In that case the Higher Education Facilities Act of 1963 authorized construction grants and loans for buildings and facilities used exclusively for secular educational purposes. Grants were made to four church-related colleges and were upheld. Only that portion of the law which limited the government's interest in covered facilities for 20 years was invalidated. The remainder of the law was left to stand. The Court applied a test of partial invalidity quite similar to that long followed in Missouri and quoted above.

We have no difficulty whatsoever in excising the loan of textbooks to parochial school teachers from the body of Senate Bill 638. The operation is a minor one with no risk of mortality. There is no warrant in the record for a finding that the legislature would not have enacted the Bill had it known that loans of

books to teachers in religious schools is impermissible. Such loans are minimal but even if they were not the whole purpose of the Bill was to enlarge the class of students entitled to the loan of textbooks.

We have another minor task, which is to repair a post-operative, surgical hernia which has appeared. The simple issue is this: should loans of books to public and non-public school teachers be allowed after teachers in private, church-dominated schools are stricken as beneficiaries? Our answer, reluctantly, is a negative. The reason is that one of the premises of the Bill is the distribution of books on an equitable and non-discriminatory basis. The advancement of religion was carefully guarded against, but there was no purpose to inhibit it or to discriminate against it. Students were intended to be so treated; so were teachers. Therefore, we are forced to conclude that it would defeat the legislative intent to discriminate against teachers in parochial schools. Constitutional objections to invidious discrimination aside, we find that had the legislature known that all teachers would not share in the loan of textbooks it would have provided for loans to none of them. The loans of books to teachers in secular schools, public and private, is inseparable from loans of the same books to teachers in sectarian schools. The result is that the removal of the entire class of teachers as a single group of beneficiaries must be removed from the Bill.

The alleged "void-for-vagueness"

and alleged unconstitutional delegation of legislative powers.

The Ladue defendants, although they do not argue that the Bill violates the federal constitution, help the plaintiffs indirectly by suggesting that the Bill is a vague, indefinite, unconstitutional delegation of legislative power to the school boards. Instances are imagined in which the school boards will be faced with many perplexing problems in establishing adequate rules, regulations and guidelines for the equitable, non-discriminatory distribution of loaned books. The chief difficulty with this argument and, it seems to me, a complete answer is the fact that the law just repealed presented virtually the same problems. All of them seemed to have been solved, for there was nothing in the record to the contrary. Nor has this court heard of any eruptions of discontent either with what the boards have done under the repealed law or what they propose to do under the new one. The laying down of guidelines under the helpful leadership of the State Board of Education seems to be proceeding apace. The non-public school authorities seem to be cooperating.

One of the public school officials testified that he had received very few inquiries from parents. We cannot believe that the able counsel and distinguished members of the Ladue board will remain rooted in their tracks or drawn into divisive conflicts with sectarian or private schools.

In Borden Company v. Thomason, Mo., 353 S.W. 2d 735, the plaintiff sought to enjoin enforcement of the "Unfair Milk Sales Practices Act". Many of the same

constitutional doctrines and dogmas invoked by the Ladue board were marshalled by the Borden Company in its suit, i.e., vagueness, delegation of legislative powers, etc. The Court said:

> "If in the application of the law material difficulties or uncertainties appear they may be corrected by rules and regulations promulgated by the Commissioner, or a proper case may be presented to the court for decision. Difficulty of application does not make a statute unconstitutional. McElhone v. Geror, 207 Minn. 580, 292 N.W. 414. Many of the arguments made should properly be addressed to the Legislature...."

We are driven to conclude, finally, that although a small segment of Senate Bill 638 must be eliminated from the law, the remainder does not offend against any provision of the federal constitution or Bill of Rights, and is not an unlawful delegation of legislative powers in contravention of the Missouri constitution.

V

Senate Bill 638, with the loans of books to teachers elided, does not violate any provisions of the Missouri constitution prohibiting the advancement of religion or the use of public funds for private purposes.

This is a horse quickly curried. Several provisions of the Missouri constitution would have prohibited any aid to

religious schools or techers therein. Senate Bill 638 is clearly intended to aid school children and not their schools; we have stricken book loans to all teachers. Our findings and conclusions that the Bill has a larger public purpose derived from the police power to advance the general welfare by helping educate all children on an equitable, non-discriminatory basis is a sufficient answer to almost all of the remaining arguments of the plaintiffs.

It is quite true, of course, that the mere fact that a statute passes muster under the federal constitution does not necessarily mean that it satisfies state constitutional requirements. This is familar doctrine mutually respected by state and federal courts. See Harfst v. Hoegen, 349 Mo. 808, 163 S.W. 2d 609. Missouri has not one but several constitutional provisions dealing with taxation for or expenditures in aid of religion. Plaintiffs have combed them all from the Missouri constitution, and insist that each and all lay Senate Bill 638 low.

They invoke Article I, Section 6 of our Missouri Bill of Rights providing that "no person can be compelled to...support... any...system of worship, or to maintain or support any...teacher of any...denomination of religion..." We find no violation of Article I, Section 6 in the free loan of textbooks to elementary and secondary school students.

Article I, Section 7 provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any religion, or in aid of any...

teacher thereof, as such..." The phrase "directly or indirectly" refers to the means and not some incidental benefit. Board of Education v. Allen, 20 N.Y. 2d 109, 228 N.E. 2d 791 (construing that state's free textbook loan law). Otherwise, no city could justify paving or lighting the streets and sidewalks in front of cathedrals, churches, temples and synagogues. Nor could police be summoned to protect worshippers from those who would interrupt church services.

We find nothing in Harfst v. Hoegen, 349 Mo. 808, 163 S.W. 2d 609, or Berghorn v. Reorganized School District No. 8, 364 Mo. 121, 260 S.W. 2d 573 to militate against these distinctions. Those cases dealt with the use of public funds for direct aid to religiously oriented institutions. We have elsewhere at length shown that such a purpose was not intended and will not be a primary effect of Senate Bill 638.

Plaintiffs also confront the Bill with Article III, Section 38(a) of the Missouri constitution provided that the general assembly shall have no "right to grant public money or property...to any private person" except in enumerated situations. The loan of textbooks is not a grant of money or property, whether the books are loaned by school districts or public libraries. The latter could not be justified under the strict construction which plaintiffs would have us read into Article III, Section 38(a). The textbooks here involved are loaned to all members of a class for public purposes, and not to specified individuals for private purposes.

In support of their argument, plaintiffs dredge up one case from the stagnant ponds of the 19th century. They find no case in the living, running currents of the law. The case is State ex rel Garth v. Switzler, 143 Mo. 287, 45 S.W. 245 decided in 1898. The opinion is a masterpiece of illogic and replete with the rhetoric of a constitutional philosophy which would have invalidated every piece of social legislation since workmens compensation acts began to be passed in this country after the turn of the century.

Switzler held that the state could not make cash grants to students at the state university for the purpose of supplying their living expenses while there. The Court chose to regard those payments as "a pure and simple gift of the public money by the state to private individuals for their own private use". Speaking of the individual as a citizen, the court said that "it is his province to support the government, and not the government to support him", a perfectly supportable view which recalls similar immortal words of President Kennedy. But the author of the Switzler opinion, then launches into such sentences as: "Paternalism is a plant that should receive no nourishment upon the soil of Missouri", and tells us that the framers of the constitution of 1875 "sought most sedulously to curb the power of those clothed with authority to legislate in behalf of favored classes". If school children qualify as a "favored class" then Switzler, applied today, would strike down the law which Senate Bill 638 repealed and which provided for loans to public school students. Switzler would invalidate school lunch programs and

those which give school children a modicum of health cure. In any case, we deal here with loans and not gifts. The undistinuished opinion in Switzler is thus distinguished.

We must repeat again that the mere fact that an enactment has an incidental effect favoring private individuals does not invalidate it so long as its primary purpose and effect is to a public one. Kintzelle v. City of St. Louis, Mo., 347 S.W. 2d 695 (sale of certain lands to the Catholic oriented St. Louis University); Jasper County Farm Bureau v. Jasper County, Mo., 286 S.W. 381; State ex inf. Dalton v. Land Clearance Authority, 364 Mo. 974, 270 S.W. 2d 44; State ex rel. Kansas City Insurance Agents Association v. Kamaslaty, 319 Mo. 386, 4 S.W. 2d 427.

There is only one more contention of plaintiffs under the Missouri constitution which requires mention. It is argued that all moneys for public school purposes must be deposited in the Public School Fund established by Article IX, Section 5, and that that section prohibits the use of the income from that Fund for other than public school purposes. Conceded, but it does not follow that Section 5 has been violated by Senate Bill 638, as occurred in McVey v. Hawkins, Mo., 258 S.W. 2d 927 and Special District v. Wheeler, Mo., 408 S.W. 2d 60. The funds made available for use by the school districts under Senate Bill 638 came from the Free Textbook Fund which in turn receives its money from the premium taxes collected from foreign insurance companies. Senate Bill 638 goes to great lengths to

require the school districts to keep their Free Textbook Funds separate from their Public School Fund monies. The Bill provides that the textbooks to be loaned shall be purchased only from the Free Textbook Fund. We find no violation of Article IX, Section 5, and no invasion of the sacred trust under which the Public School Funds are held.

CONCLUSION

I should add one more personal note which counsel may find startling. Had I been privileged to sit with my law school dean, Mr. Justice Rutledge, in deciding the Everson (school busing) case, I would have joined in his dissent because I share his humanitarian views of legal philosophy. But since that decision a quarter of a century ago, the tide of history and human affairs has given an irresistably powerful tug toward the socialization of the law. If this is the will of the people, it will surely continue to color and give varying shades of meaning to any living constitution.

This is not to say that Senate Bill 638 should be taken as only the first breach of the "wall of separation" between church and state. This statute carries the law to its very limits but it does not erode the foundation of the wall so as to undermine it.

On the other hand, the wall, though high, is broad at the top. Like the Great Wall of China, it may be walked, as that one recently was, by proponents of opposing ideologies. Church and state may

both live in peaceful coexistence. We do not fear another Belfast conflict in Missouri.

Orville Richardson,
Judge

October 5, 1972

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
EN BANC

ROBERT W. PASTER et al.,
Appellants,

v.

C. ED TUSSEY et al.,
Respondents,

and

MR. AND MRS. JOSEPHUS REYNOLDS et al.,
Intervenors-
Defendants (Partial) Appellants, No. 58149

and

JOHN C. DANFORTH, Attorney General of Missouri,

Intervenor-defendant Appellant.

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY
The Honorable Orville Richardson, Judge

This appeal involves questions as to whether or not the provisions of the Missouri Constitution of 1945 and the First and Fourteenth Amendments to the United States Constitution prohibit, permit or require the lending of school textbooks to pupils and teachers who, respectively, attend or teach in non-public schools (not operated for profit) as required by Senate Bill 638, 76th

General Assembly (Second Regular Session, 1972) -- now designated as §§ 170.051 and 170.055, RSMo 1969. Such issues were tried in a declaratory judgment action wherein the trial court upheld the constitutionality of the statutory enactments noted in so far as they applied to pupils. Jurisdiction of the appeal therefrom is in this court by virtue of Article 5, § 3 of the Missouri Constitution.

Prior to the enactment of Senate Bill 638, statutory provisions for the providing of school textbooks in this state were detailed in § 170.051 (now repealed) and read as follows:

> 1. Each school board shall purchase from the free textbook fund and from the incidental fund of the district if the free textbook fund is insufficient and furnish free all of the textbooks for all the pupils in the elementary grades of the public schools of the district. The board may provides texts, supplementary texts, library and reference books, and additional instruction supplies, for all the pupils of the district, but funds shall not be expended for these materials for high school pupils until the needs of the elementary grade pupils have been adequately supplied. The books are the property of the district but shall be furnished to the pupils under rules and regulations prescribed by the school board.
>
> 2. When the money apportioned

under the provisions of section 148.360, RSMo, is received by the treasurers of the various counties and the city of St.Louis, the county clerk of each county shall apportion the money among the various school districts in each county in the following manner: The amount to be apportioned to each school district shall be determined by multiplying the number of children on the last enumeration list of the school district by the ratio used by the state comptroller in making the distribution of the foreign insurance tax moneys among the counties of the state, and the county court shall order the county treasurer to place to the credit of the free textbook fund of each district, the amount thus obtained, or shall draw its warrant in favor of the proper township treasurer for the amount due the districts of the various townships, and shall also draw its warrant in favor of the treasurer of any school district organized as a six-director district for the amount due the district and the money thus received shall be placed to the credit of the free textbook fund of the district.

3. No school board shall pay a higher price for books than is paid by any other school district in this state, or in any other state purchasing textbooks in the open market. No contract for books for a period of more than five years shall be made by any school dis-

trict under the provisions of this law. Any owner, agent, solicitor or publisher of textbooks who shall offer for sale in this state or sell to any board of directors or board of education textbooks at a higher price than herein specified shall be guilty of a misdemeanor and shall upon conviction thereof be punished by a fine of not less than five hundred dollars and not more than ten thousand dollars for each offense.

The new statute, again identified as §170.051, now reads as follows:

1. As used in this section, the following terms shall have the meaning indicated unless the context otherwise requires:

(1) "School" means any elementary or secondary school, public or nonpublic, nonprofit, within this state, and wherein a resident of the state may legally fulfill the compulsory school attendance requirements of section 167.031, RSMo.

(2) "Textbook" means workbooks, manuals, or other books, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

2. Each public school board shall

purchase and loan free all textbooks for all children who reside in the district and attend an elementary or secondary school in this state.

3. Textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended.

4. Title to and control and administration of the use of all textbooks purchased under this section shall be vested in the public school board and shall be loaned free to pupils and teachers upon their request. The public school board may prescribe rules and regulations governing the loaning of textbooks.

5. No school board shall be required to purchase textbooks to be lent under the provisions of this section and section 170.055 from sources of revenue other than the free textbook fund, except that in addition to the textbooks purchased under this section and section 170.055, a school board may purchase from its incidental fund texts, supplementary texts, library and reference books and instruction supplies, for the use of pupils attending public schools only. In the event that the money from the free textbook fund is insufficient to purchase textbooks for all elementary and secondary pupils, then

priority shall be given to elementary pupils.

6. Only textbooks which are filed with the state board of education pursuant to section 170.061, shall be purchased and loaned under this section. No textbooks shall be purchased or loaned under this section to be used in any form of religious instruction or worship.

7. Textbooks shall be purchased from the free textbook fund. No portion of the public school fund referred to in section 5, Article IX constitution of this state, shall be used to pay the cost of textbooks under this section nor shall funds under this section be in any way commingled with the public school fund.

The new § 170.055 is only a reenactment of subsections 2 and 3 of repealed § 170.051, as they existed prior to passage of Senate Bill 638, and thus has no relevant significance to the questions presented. In each instance, the basic source of revenue for the free textbook fund is the tax imposed by the state on foreign insurance companies for "business done in this state" as provided in § 148.340.

As would be apparent, the constitutional challenge to the two new sections is directed toward the mandate therein that textbooks be provided to pupils attending private schools (not operated for profit) -- including parochial and otherwise; and, in that connection, we

would be remiss in not acknowledging the assistance derived from the excellent arguments and briefs of the parties, the Attorney-General (who intervened to argue for the constitutionality of the statutes), and Amici Curiae. Each has sought to interpret the prevailing law, both federal and state, by reference to many decisions handed down by the courts of this country.

As a state court we are charged, primarily, with the duty of ruling on the constitutional validity of the legislative enactments herein challenged in light of those provisions of the Missouri Constitution which are relevant thereto. If such constitutional provisions proscribe the same, we have no alternative in the performance of that duty but to so rule, unless and until such provisions have been made inoperative by the United States Constitution as interpreted and construed by the Supreme Court of the United States or the people of Missouri have amended the same.

For simplicity of reference, we set out portions of the Missouri Constitution found in Article I (captioned -- Bill of Rights), Article IX (captioned -- Education) and Article X (captioned -- Taxation):

> Art. I, § 6:
>
> That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomina-

tion of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

Art. I, § 7:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Art. IX, § 1 (a) (in part):

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

Art. IX, § 5:

The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and

other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever.

Art. IX, § 8:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

Art. X, § 1:

The taxing power may be exercised by the general assembly for state purposes, and by counties and other

political subdivisions under power granted to them by the general assembly for county, municipal and other purposes.

Art. X, § 3:

Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law.

It has long been recognized in Missouri that "...the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function...," City of Edina, Etc. v. School District, Etc., 267 S.W. 112, 115 (Mo. banc 1924), and more recent decisions of this court have reaffirmed the principle that supporting the public educational process is a governmental activity. All pupils are free to participate therein.

This court said in Harfst v. Hoegen, 163 S.W. 2d 609 (Mo. banc 1942), at l.c. 612-614: "Missouri follows generally the usual pattern of religious guaranties and safeguards in its Constitution, * * *

It forbids a school district to make payments from any public funds to sustain any private or public school controlled by any sectarian denomination. * * *

"But our Constitution goes even farther than those of some other states. In addition to the provisions already mentioned we have still another. Art. II, Section 7 (now Art. I, § 7) says: 'That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.' Thus, we have an explicit interdiction of the use of public money for a teacher of religion as such which has been violated by the board. * * * The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. If the management of this school were approved, we might next have some other church gaining control of a school board and have its pastor and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none. The faithful observance of our constitutional provisions happily makes such a

condition impossible.

"It is of no purpose to discuss or decide other questions raised except to point out that the long acquiescence of appellants in the management of the school cannot make such management proper. No one may waive the public interest; the constitutional provisions are mandatory and must be obeyed." (Emphasis added.)

This court in Berghorn v. Reorganized School Dist. No. 8, 260 S.W. 2d 573, l.c. 582-583 (Mo. 1953), affirmed the trial court's reasoning, as follows: "The trial court construed Article I, Sections 5-7, and Article IX, Section 8 of the Constitution of Missouri 1945 to mean 'that the State of Missouri has a fixed and definite policy to maintain free public schools separate and apart from all religious, church or sectarian activities and influences to the end that absolute freedom of choice of religion and freedom of worship shall be unaffected by any religious influences, activity, proselyting example and indoctrination through and intrusion into the free public school system of the State of Missouri. * * * That it is the unqualified policy of the State of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs; * * *.'"

In McVey v. Hawkins, 258 S.W. 2d 927

(Mo. banc 1953), this court held that transportation of parochial school pupils was an expenditure of public school funds for other than the maintenance of free public schools as directed by the constitution of this state.

Although involving a different factual situation, the holding in the McVey case was re-affirmed and followed in Special Dist. For Ed. & Tr. of Hand. Child, v. Wheeler, 408 S.W. 2d 60 (Mo. banc 1966). See also McDonough v. Aylward, 500 S.W. 2d 721 (Mo. 1973).

From all of which, it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution. That such is true was recognized and appreciated recently by the Supreme Court of the United States in Wheeler v. Barrera, ___ U.S. ___ (Slip Opinion, dated June 10, 1974). See also Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971), affirmed 405 U.S. 1050 (1972), and Luetkemeyer et al. v. Kaufmann et al., 364 F. Supp. 376 (W.D. Mo. 1973). Keeping in mind this existing historical background, we consider the arguments of the parties.

Defendants and the Attorney-General seek to distinguish each of the Missouri cases mentioned. They submit that the Harfst and Berghorn cases rejected direct financing of the total educational program of nonpublic schools; that the Special District case considered special

educational services; that the McVey case ruled a single issue, i.e., that funds could not be taken from the Public School Fund to transport pupils to private schools as such an expenditure was not for the purpose of maintaining free public schools; and, that none of them involved providing textbooks. The latter statement is certainly true, but, even though such cases may be distinguished factually it does not follow that they do not provide guidelines for construing the constitution of this state in resolving the instant case. In arguing further, it is suggested that if tax revenues for providing transportation for private pupils had been placed in a special fund, and not commingled with the Public School Fund, that the expenditure found unconstitutional in McVey presumably could have been upheld. The presumption having been made is then applied to the textbook question. A portion of the printed argument declares: "We readily agree that the funds which school districts obtain by levy, and their mandatory share of state revenues, may not be used for any purpose not related to the public schools. * * * We would also agree that any funds in excess of the constitutional minimum which the General Assembly provides to school districts for school purposes may not be used for other purposes. * * * But the funds available for the purchase of textbooks are not of that sort. They come from proceeds of a particular tax which are subject to the complete control of the legislature. The legislature has made the fund available for one particular purpose -- the purchase of textbooks to be loaned to pupils in all schools of the state. The legislature has

not made the fund available for general school purposes. The funds never become school funds. McVey v. Hawkins, 258 S.W. 2d 927 (Mo. 1973), and related cases simply do not apply to this situation. The funds have never become school funds."

As shown by the Memorandum Opinion filed, the trial court followed the same theory in concluding that: "The funds made available for use by the school districts under Senate Bill 638 came from the Free Textbook Fund which in turn receives its money from the premium taxes collected from foreign insurance companies. Senate Bill 638 goes to great lengths to require the school districts to keep their Free Textbook Funds separate from their Public School Fund monies. The Bill provides that the textbooks to be loaned shall be purchased only from the Free Textbook Fund. We [the trial court] find no violation of Article IX, Section 5, and no invasion of the sacred trust under which the Public School Funds are held."

For an opposite view, we quote from one of the briefs of Amici as follows: "The 1972 Missouri textbook law raises a false issue and sets a dangerous precedent when, calling for an antiseptic separation of free textbook funds from 'the public school fund referred to in section 5, article IX' (Sec. 170.051, sub. 7), it implies that tax funds may be used to finance education in church-related and nonpublic schools if the money comes from some public fund other than one referred to in article IX, Section 5. As already noted, this constitutional provision is rather broad, including 'all monies...belonging to or donated to any state fund for public school purposes.'"

The thrust of the argument is that textbooks are a basic and integral part of the educational process just as much as desks, blackboards and other facilities; and, that carving out any one item from that process, for special treatment, is violative of the constitutional mandate that the state will finance the educational process solely in public schools open to all.

At this point, we do make the comment that determining the extent to which the legislature may compartmentalize tax revenues and appropriate the same for specified purposes is not the ultimate issue for decision. The question is whether or not the result, flowing therefrom, is violative of any provision of the state constitution.

Before resolving the state question, we look to federal cases relied on by the parties. Defendants submit that Board of Education v. Allen, 392 U.S. 236 (1968) (wherein a textbook law of New York was approved as not violative of the Establishment Clause even though textbooks were provided to pupils attending church-related non-public schools) is controlling, and quote the following thereform, l.c. 243:

> The law merely makes available to all children the benefits of a general program to lend schools books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and

the financial benefit is to parents and children, not to schools.

The rationale of the Allen opinion is recognized as being based on the "pupil benefit" theory or the "pupil-parent benefit" theory even though an indirect benefit to the private school was acknowledged. Plaintiffs suggest somewhat of a limitation was placed on such theories by the Supreme Court in Norwood v. Harrison, 413 U.S. 455 (1973), when it said at l.c. 463:

> A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves.
>
> An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise.

Defendants distinguish the holding in the Norwood case from the Allen case by pointing out that in the former: "The Court held that to sanction the textbook aid would permit the state to do indirectly that which it was expressly forbidden to do directly -- to promote racially segregated schools." See dissent of Justice Douglas in Wheeler v. Barrera, supra.

Some of the other federal cases relied on by the parties include: Committee for Public Schools v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Sloan v. Lemon, 413 U.S. 825 (1973); Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973); Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Education, 330 U.S. 1 (1947); and Walz v. Tax Commission, 397 U.S. 664 (1970). All of the cases cited, including those state cases from other jurisdictions, and other federal cases have been considered. From all of which, two deductions may be made: one, when approval is given for the diversion of public tax revenues to any phase of the educational process not related to the public school system a very tenuous constitutional position is created -- referred to in the cases noted, generally, as "verging" on unconstitutionality; second, disposition of the instant case is not controlled by federal law nor have the relevant portions of the Missouri Constitution been made inoperative. For instance, as said by Chief Justice Burger in the Norwood case, supra, at l.c. 462:

> In Pierce [Pierce v. Society of Sisters, 268 U.S. 510 (1925)], the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if

private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

Again, as said recently in Luetkemeyer v. Kaufmann,supra, "The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question."

We return to Missouri law to resolve the issues presented and reach the following conclusions:

1. That portion of § 170.051, subpara. 4, requiring public school boards to provide textbooks to teachers in private schools "upon their request" is violative of Art. I, § 6 of the Missouri Constitution prohibiting the "support"of any "teacher of any sect."

2. Those portions of § 170.051 requiring public school boards to provide textbooks to pupils attending private schools are violative of Art. IX, § 8, of the Missouri Constitution (heretofore quoted) which, in part, provides: "Neither the general assembly, nor... [other governmental units] shall ever make an appropriation or pay from any

public fund whatever, anything in aid of any religious creed, church or sectarian purpose..." Obviously, if the expenditures called for in § 170.051 were considered as in aid of a church, this section, as well as others herein quoted from the Missouri Constitution, would make the statute unconstitutional. However, for the purposes of this case we have applied the "pupil-parent benefit" theory, without deciding if we were at liberty to do so in light of the absolute separation of church and state doctrine evidenced throughout the Missouri Constitution, to the statute and Art. IX, § 8. Is the expenditure of funds to the pupil-parent in aid of a sectarian purpose? Which, in turn, calls for deciding whether or not an individual can have a sectarian purpose, or whether or not only a "sect" can have such a purpose. When a sect, be it religious, political or otherwise, establishes a school for promoting and perpetrating the tenets of the sect a sectarian purpose is evident. If such a purpose did not exist, it would be totally illogical for the sect to assume the financial burden of providing a school for its followers. In the instant case, most of the schools, denominated as private, have the worthy objective of providing pupils with an education at a place permeated with a religious atmosphere. To succeed, or even exist, such a school must have pupils (or parents thereof) who are adherents of the same sectarian purpose. Individuals, acting individually or collectively, can have and promote a sectarian purpose, and by attending a private school designed for such a purpose do, in fact, promote the sectarian objective for which Art. IX, § 8, pro-

hibits the expenditure of any public funds.

3. Wether or not other provisions of the Missouri Constitution prohibit the expenditure of public funds as proposed by § 170.051 need not be resolved at this time.

4. This case involves the expenditure of "state" funds and not the expenditure of "federal" funds.

5. Those portions of the statute herein found unconstitutional pertain solely to expenditures to pupils and teachers of private schools. There is nothing in the record to indicate that § 170.051 would not have been enacted by the General Assembly had it known such portions were invalid; and, we are assured of this by reason of the fact that after such portions are excised the statute will have the same effect that it did prior to the amendment thereof.

Although parents who send their children to private schools bear the burden of supporting such institutions, as well as the public schools, the additional burden is self-imposed. That such a sacrifice has been made by so many through the years makes it self-evident that individuals, as such, do act and live with a sectarian purpose in the area of education -- an objective which the people of Missouri, speaking through their constitution, have protected fully but also have declared to be one personal to the individual.

From the many cases written on the subject, as well as from published legal

writings, two schools of thought thread their way throughout. One, the additional burden has been carried too long by those supporting private schools and it would be better to assist them in that effort than to have private schools close and thus increase the tax revenue expenditures for public schools. Second, there are those that appreciate the great contribution made by persons supporting private schools but, the taxation question aside, believe that religious freedom can be preserved better by not bringing government into the private school -- the latter thought being based on the "carrot and stick" idea that it is common knowledge that acceptance of "government funds" is with certainty immediately followed by "government controls."

This court does not have the privilege, as do individuals, of selecting what it might think was the most meritorious approach to an ever existing problem, but it is bound in the resolution of legal conflicts stemming therefrom to follow the dictates of the Missouri Constitution as now written.

The judgment is reversed, except to the extent it prohibited expenditures of funds to teachers in private schools, and the cause is remanded with directions for entry of judgment in accordance with this opinion.

J.P. Morgan, Judge

Donnelly, C.J., Seiler, Holman, Henley and Finch, JJ., concur; Bardgett, J., dissents in separate dissenting opinion filed.

Dissenting Opinion

I respectfully dissent. The provisions of section 170.051, as amended in 1972 by Senate Bill 638, the statute under attack, have been set forth in the principal opinion and need not be repeated here.

The contention that Senate Bill 638 as it applies to nonpublic school students is violative of the First Amendment, United States Constitution, clearly has no merit. In Board of Education v. Allen, 392 U.S. 236 (1968), the United States Supreme Court upheld the constitutionality of a New York statute as against a First Amendment attack. The New York statute is, in substance, the same as Senate Bill 638. As of February 1, 1973, fourteen states had enacted laws providing for the furnishing of textbooks and instructional material to pupils of nonpublic schools. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), loc. cit. 815-816, footnote 2. The princpal opinion seems to allow for the inference that the U.S. Supreme Court has modified the holding of Allen in Norwood v. Harrison, 413 U.S. 455 (1972). Norwood was an equal protection case. It involved the loaning of books by the State of Louisiana to public and nonpublic school children. The court did not declare the Louisiana statute to be violative of the First Amendment nor was the statute held unconstitutIONal on any other ground. The practice of the State of Louisiana in

furnishing textbooks to certain nonpublic schools which engaged in racial discrimination on admission was held to violate the equal protection clause of Amendment Fourteen, U.S. Constitution, and therefore was an activity which a state could not engage in nor lend its aid to by the furnishing of school books.

In Norwood the court relied upon Allen in upholding the constitutionality of the school-book statute and in remanding the case to the District Court for the purpose of permitting the District Court to determine whether a particular participating nonpublic school was practicing racial discrimination in its admission policies. If the school was not engaged in racially discriminatory admission practices, the state-supplied-school books were to be made available to the students of that school. The quotation from Norwood appearing in the principal opinion that, "A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases," does not deal with the type of statute before the court and does not refer to the subject matter of Allen. The "prior cases" referred to must be read in context with the sentence preceding the quotation which is, "This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[6]" (Emphasis added.) The cases referred to are listed in footnote 6 and they involved racial discrimination.

Norwood stands for the proposition that a state cannot use public resources

in furtherance of a constitutionally impermissible objective even though the means in and of themselves are constitutionally permissible. In other words, a state may utilize public monies in aid of a public transportation system, such as Bi-State in Missouri, because a statute so providing would be constitutional. But the state could not do so if the transportation system practiced racial discrimination in admitting or seating passengers aboard its vehicles because the discriminatory practice would violate the equal protection clause of Amendment Fourteen.

In order for the U.S. Supreme Court to have reached the result it did in Norwood, it was necessary that the holding in Allen be reaffirmed and not modified. This is so because the court affirmatively authorized the distribution of books to nonpublic school children attending nonpublic schools which were not engaged in racially discriminatory admission practices.

As noted, Allen involved a statute of New York which is basically the same as Senate Bill 638. The New York Court of Appeals in Board of Education of Central Sch. Dist. No. 1 v. Allen, 228 N.E. 2d 791 (1967), held that the New York loaned-books statute did not offend the New York constitutional provisions.

Article XI, section 3, of the New York Constitution provides:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other

than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denomination tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Except for the provision relating to transportation of school children, the New York provision is certainly just as restrictive as Art. IX, sec. 8, Mo. Const. 1945, set forth in the principal opinion. There is no material difference between the proscriptive language of the New York provision which prohibits the state from using its property credit or any public money--directly or indirectly in aid of--any school--wholly or in part under the control of any religious denomination, or in which any denominated text or tenet is taught, and the provisions of Art. IX, sec. 8, Mo. Const., which prohibits the general assembly from making any appropriation or paying from any public fund whatever, anything in aid of any religious creed, church, or sectarian purpose or to sustain any private school, or other institution of learning controlled by any religious creed, church, or sectarian denomination whatever.

In Allen the New York Court of Appeals held, 228 N.E. 2d 791, 794: "The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, sec. 1, supra), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no

serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

"Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly."

The New York court further observed, "Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrowing from public libraries. We do not consider this indirect aid to private or parochial schools." 228 N.E. 2d 794. The same, of course, is true in Missouri.

The New York court concluded that its school-book statute entails no aid to parocial schools and upheld the statute under the New York and United States Consitutions.

On appeal to the U.S. Supreme Court in Bd. of Education v. Allen, 392 U.S. 236 (1968), the question was principally whether the New York school-book statute offended Amendment One of the U.S. Constitution. The U.S. Supreme Court placed principal reliance upon Everson v. Board of Education, 330 U.S. 1 (1947). In that case the court upheld a New Jersey law under which New Jersey provided for the

transportation of all children to all schools. The court said, 392 U.S. at 243: "The statute upheld in Everson would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of sec. 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution."

Thus it appears that the New York Court of Appeals and the United States Supreme Court used essentially the same criteria in holding the statute constitutional--that the benefit was to the child and not to the school.

The principal opinion suggests that the provisions of the Missouri Constitu-

tion declaring that there shall be a separation of church and state are more explicit and restrictive than the establishment clause of the U.S. Constitution. It is obvious that more words appear in the Missouri Constitution than in the U.S. Constitution and, therefore, it can be said to be more explicit. However, I suggest that the reason for this is that the state operates a public-school system whereas the federal government does not do so. I disagree with the suggestion in the principal opinion that the establishment clause of the U.S. Constitution, as construed by the U.S. Supreme Court, is less restrictive than the provisions of the Missouri Constitution. In any event, Wheeler v. Barrera, ____ U.S. ____ (Slip opinion June 10, 1974), principally concerned Art. IX, sec. 5, Mo. Const. 1945 -- not the establishment clause of the Mo. Constitution (Slip opinion at 14.) And the question of the impact, if any, of Art. IX, sec. 5, Mo. Const. 1945, on the use of purely federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended 20 U.S.C. sec. 241a et seq., has yet to be determined. Wheeler v. Barrera, supra, at 15.

The fact remains that the subject matter of Senate Bill 638 was held in Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930), in considering the provisions of the Louisiana loaned-textbook law thirty-four years ago, to be for a public purpose, and this was reaffirmed in Board of Education v. Allen, 392 U.S. 236, 247 (1967), and Norwood v. Harrison, 413 U.S. 455, 468 (1973).

Nowhere does the Missouri Constitution prohibit the reception of an incidental benefit to a religious institution which may flow from a legislative act which act has a legitimate and constitutional public purpose. The public purpose of Senate Bill 638 is the state's interest in the quality of secular education which, under Missouri laws, can be received by children by attending nonpublic schools and thereby satisfy the requirements of our compulsory attendance law -- sec. 167.031, RSMo 1969.

The direct beneficiary of Senate Bill 638 is the child and not the school or religious institution. Cochran, supra, Allen, supra, Borden v. Louisiana State Board of Education, 123 So. 655 (La. 1929), infra, and Chance v. Mississippi State Textbook Rating & Purchasing Board, 200 So. 706 (Miss. 1941), infra.

In Borden v. Louisiana State Board of Education, supra, the Supreme Court of Louisiana had before it a Louisiana statute which provided books to all children, including those attending church-related nonpublic schools. The attack upon the statute relevant to our case was that it violated secs. 4, 8, 12, and 14 of Art. 4 of the Louisiana Constitution. The Louisiana Supreme Court summarized those provisions at 123 So. 660 as follows: "Section 8 of article 4 prohibits, among other things, the taking of money from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher of religion as such, or for private, charitable, or benevolent purposes to any person or com-

munity, excepting certain institutions conducted under state authority. Section 4 of article 1 relates to the right to worship God according to the dictates of one's own conscience, and prohibits the passage of laws establishing religion, or the free exercise thereof, or the granting of preferences to, or making discriminations against, any church, sect, or religious creed. Section 13 of article 12 prohibits the using of public funds for the support of any private or sectarian school. Section 12 of article 4 prohibits, among other things, the lending, pledging, or granting the funds, credit, property, or things of value of the state or of any political corporation thereof to or for any person or persons, association, or corporation, public or private."

It is immediately apparent that the provisions of the Louisiana Constitution and the provisions of the Missouri Constitution are practically identical. Indeed, it would appear that one was copied from the other. The significance of the Borden decision by the Supreme Court of Louisiana is that it is a case in which the constitutional provisions are the same as Missouri's and the constitutional attacks upon the statute are the same as in this case.

The Louisiana Supreme Court upheld the statute saying that the appropriation of money was not for the use of any church, priest, sectarian or even public schools. "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the

resulting benefit to the state that the appropriations were made." 123 So. 660. The court further held that the statute did not grant or donate the books to private persons but only loaned them to the children and that the funds from which the appropriations were made were not part of the public school fund.

It was also contended that the Louisiana act violated the due process clause of the Louisiana Constitution in that the taxes cannot be levied or expended for any but a public purpose. The court held that the expenditure of public funds for the school books was a public purpose.

Cochran v. Louisiana State Board of Education, 123 So. 664 (La. 1929), was a companion case to Borden, supra, and adopted the opinion in Borden. Cochran was appealed to the United States Supreme Court (Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930).) The U.S. Supreme Court unanimously affirmed the holding that the taxing power of the state of Louisiana had been executed for a public purpose saying that the interest of the statute "is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." 281 U.S. at 375.

In Chance v. Mississippi State Textbook Rating & Purchasing Board, 200 So. 706 (1941), the Mississippi Supreme Court upheld a state textbook law which provided books to children attending church-related nonpublic schools. The court based its decision upon the "child benefit theory", holding that the schools were not the

beneficiaries of the act and that the lending of books to individual pupils was not a direct or indirect aid to the respective schools which they attended. The Mississippi Supreme Court considered the opinion of the Louisiana Supreme Court in Borden, supra, and the United States Supreme Court's opinion in Cochran, supra, authoritative, saying that the constitutional and statutory provisions of Mississippi and Louisiana, for all practical purposes, are identical. 200 So. at 712.

In Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968), the Rhode Island Supreme Court upheld a state textbook law similar to the New York law which was the subject of Allen, supra, on the authority of Allen. The only similar case to the contrary is Dickman v. School District No. 62C, Oregon City, of Clackamas County, 366 P.2d 533 (1961), and that case was decided before Allen, supra.

The opinions of the Supreme Court of Louisiana in Borden, supra, the Supreme Court of Mississippi in Chance, supra, and the New York Court of Appeals in Allen, supra, are significant because the pertinent constitutional provisions of those states are similar to Missouri's and the courts of these states have upheld loaned-school-textbook laws.

In Hickey v. Board of Education of City of St. Louis, 256 S.W. 2d 775 (Mo. 1953), this court said at 778: "'It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and,

therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute.' . . . Those limitations must be 'expressed in the Constitution or clearly implied by its provisions.' . . . A statute will not be held unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision."

The people of Missouri have been no more stringent in writing the Missouri Constitution than the people of New York, Louisiana, and Mississippi have been in writing their constitutions. The long-standing opinions of the highest courts of these three states, dealing with the same issues under similar state constitutional provisions as the instant case presents, constitute strong and persuasive precedent for the conclusion that Senate Bill 638 is not violative of the Missouri Constitution.

Art. IX, sec. 8, Mo. Const., permits of the same construction as the New York Court of Appeals, the Supreme Court of Louisiana, and the Supreme Court of Mississippi, gave to their school-book statutes under constitutional provisions similar to Missouri's and, therefore, adhering to the fundamental principle of construction set forth in Hickey v. Board of Education, supra, I believe Senate Bill 638 is not in conflict with Art. IX, sec. 8, Mo. Const. 1945, and should be held to be constitutional.

The trial court held that the portion of sec. 170.051, subpar. 4, which requires school boards to provide textbooks to teachers in private schools, to be violative of Art. I, sec. 6, Mo. Const.,

which provides that no person can be compelled to maintain or support a teacher of any sect, church, creed or denomination of religion, and the principal opinion affirms that portion of the trial court's decree. That affirmance is, of course, understandable as it follows this court's decision on the principal issue in the case--the loaning of secular textbooks to the pupils. However, since I disagree with the decision on the principal issue for the reasons stated supra, I must state that in my opinion the loaning of textbooks to teachers which, under the statute, cannot be used in any form of religious instruction or worship, could not reasonably be considered as maintaining or supporting a teacher of any religion.

Appellants contend that Senate Bill 638 violates Art. IX, sec. 5, Constitution of Missouri 1945, which prohibits the state public school fund from being used for any purpose other than establishing and maintaining free public schools. The purpose of Art. IX, sec. 5, is to maintain the integrity of the finances of the public schools. It is not directed against religious impaction as such. It has the sole purpose of impeding the use of school funds for nonschool purposes, however legitimate.

The public schools derive their support from state and local sources. Under Art. X, sec. 11(c), school districts may adopt and increase public school levies on real and personal property within the district. Art. IX, sec. 3(b) provides that at least 25% of the total state revenues, exclusive of interest and sink-

ing fund payments, must be allocated for public school purposes. Art. III, sec. 36, establishes expenditures for school purposes as the second priority, coming behind only payments of interest and principal on state indebtedness. The funds which school districts obtain by levy, and their mandatory share of state revenues, may not be used for any purpose not related to the public schools.

Furthermore, any funds in excess of the constitutional minimum which the general assembly provides to school districts for public school purposes may not be used for other purposes.

But the funds available for the purchase of textbooks are not of that sort. They come from proceeds of a particular tax which are subject to the complete control of the legislature. The legislature has made the fund available for one particular purpose--the purchase of textbooks to be loaned to pupils in all schools of the state. The legislature has not made the fund available for general school purposes. The funds never become school funds. McVey v. Hawkins, 258 S.W. 2d 927 (Mo. 1953), and related cases do not apply to this situation.

The administration of the funds by school authorities is without significance. Their use of the funds is closely restricted. There is no reason why the legislature may not charge the school officials with additional duties not involving the use of school funds.

Nor does the allocation of proceeds of the foreign insurance premium tax to

the purchase of books for public school pupils prior to 1972 alter the situation. The legislature at all times had complete control over the proceeds of the tax. It could have repealed the public school provisions which applied prior to 1972 and allowed the proceeds of the tax to go into general revenue. The public schools did not acquire a vested interest in the tax simply because, prior to 1972, they were the beneficiaries of the proceeds of the same tax. The validity of the present allocation must be determined without regard to conditions which existed prior to 1972.

In McVey v. Hawkins, supra, the expense of transporting pupils to public and nonpublic schools was paid by the school district out of the "incidental fund". The court there stated the issue as being "what use or disposition it (Commerce School District) makes of the state school funds or state aid which it has received and does in fact receive from the State School Moneys Fund, which includes part of the annual income derived from the Public School Fund of the State."

The court held that the incidental fund was part of the State School Moneys Fund and the use of that money for the transportation of nonpublic school children was not "for the support of the free public schools" and therefore violated Art. IX, sec. 5, Constitution of Missouri 1945.

In the instant case, Senate Bill 638 specifically provides that the free textbook funds be kept separate from the

school district's public school fund monies.

Therefore, the monies made available by the general assembly for free textbooks to all students never became part of the constitutionally protected public school fund and, consequently, the act does not violate the provisions of Art. IX, sec. 5, of the Constitution of Missouri 1945.

For the foregoing reasons I believe that Senate Bill 638 is not violative of the Constitutions of the United States or the State of Missouri and was a lawful exercise of the police power of the State by the general assembly of Missouri and, therefore, I dissent.

JOHN E. BARDGETT
Judge.

APPENDIX C

IN THE SUPREME COURT OF MISSOURI
EN BANC

ROBERT W. PASTER et al.,
Appellants,

v.

C. ED TUSSEY et al.,
Respondents,

and

MR. AND MRS. JOSEPHUS REYNOLDS et al.,
Intervenors-
Defendants (Partial)
Appellants,

No. 58149

and

JOHN C. DANFORTH, Attorney General of Missouri,

Intervenor-
defendant
Appellant.

ORDER

Motions for rehearing overruled. Motion for clarification overruled. The trial court is authorized to fashion a decree of enforcement which will do equity as to textbooks furnished prior to this date. See Leom (sic) vs. Kurtzman, 411 U.S. 192."

APPENDIX D

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ROBERT W. PASTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	Cause No.
vs.	)	333944
	)	
C. ED TUSSEY, et al.,	)	Division
	)	No. 16
Defendants.	)	

FINAL DECREE

This cause was heard on the issues made by the pleadings, and a judgment was entered herein on October 5, 1972. On appeal to the Supreme Court of Missouri that judgment was reversed on July 30, 1974, "except to the extent it prohibited expenditures of funds to teachers in private schools", and the cause was remanded to this court with directions for entry of judgment in accordance with the opinion of the Supreme Court. Thereafter and on August 26, 1974, motions for rehearing and clarification were overruled, and the Supreme Court added that "the trial court is authorized to fashion a decree of enforcement which will do equity as to textbooks furnished prior to this date. See Lemon v. Kurtzman, 411 U.S. 192".

After receipt of the Supreme Court's mandate this court arranged a conference with all attorneys for the parties and with other interested persons. That con-

ference was held on August 29, 1974, at 1:00 p.m. and lasted most of the afternoon. The attorneys for the parties waived the necessity of a formal hearing. After the open and public conference the court conferred with the attorneys representing all of the parties and an Assistant Attorney-General of the State of Missouri.

And now, having fully considered the matter and being duly advised in the premises, the court pursuant to the mandate, opinion and directions of the Supreme Court of Missouri, orders, adjudges and decrees as follows:

1. The plaintiffs and the intervenors, Mr. and Mrs. Josephus Reynolds and the numerous other persons who joined with them, all acting in their own behalf and as the next friends of their several children, are members of a class of children and the parents of children, all of which children attend either public or non-public, sectarian and non-sectarian, schools in the State of Missouri. Plaintiffs challenge and said intervenors support the constitutionality of certain laws of the State of Missouri. The members of their respective classes are very numerous and it is impracticable to bring them all before the court. The rights sought to be enforced or defended by all members of these two classes are joint and common as to each class. The members of each class, those who are plaintiffs and those who intervene with the Reynolds, have been fairly chosen so that they may act on behalf of all members of each class they represent.

2. The defendants Tussey, Penning-

ton, Oppenheimer, Zimmerman, Hamilton and Fernandez, members of the Board of Education of the Ladue School District, and the defendants Busse, Cummings, DeRamus, Doyle, Harris, Hurt, Martin, Pounds, Sheets, Schlafly, Schoenbeck and Smiley, members of the Board of Education of the city of St. Louis, are members of a class consisting of all members of boards of education in the state of Missouri. The members of this class are very numerous and it is impracticable to bring them all before the court. The right sought to be enforced against all members of the class is joint and common, in that all are subject to the terms of Senate Bill 638, 76th General Assembly, 2d Session (1972), amending Sections 170.051 and 170.055 of the Missouri Revised Statutes. The named defendants have been served with process or have appeared in this action. They have been fairly chosen and adequately represent the class so that they may defend on behalf of all membrs of the class.

3. There are numerous non-public elementary and secondary schools in the state of Missouri. Some of these are operated or supported by religious denominations.

4. The words "books" and "textbooks" as used in this decree mean "textbooks" as defined in Section 170.051, RSMo 1969.

5. That portion of Section 170.051, subparagraph 4, RSMo 1969, requiring public school boards to loan textbooks free to teachers in private schools "upon their request" is violative of Article I,

Section 6 of the Missouri Constitution and is void insofar as it relates to teachers of any sect, church, creed or denomination of religion.

6. Those portions of Section 170.051 requiring public school boards to purchase and loan textbooks free to pupils attending private schools is violative of Article IX, section 8 of the Missouri Constitution and are void insofar as they relate to pupils attending schools controlled by any religious creed, church or sectarian denomination whatever.

7. The named defendants, individually and as representatives of a class consisting of all members of the several boards of education throughout the State of Missouri, and all members of said class are permanently enjoined and restrained from using any funds made available to them pursuant to Section 148.360 or Section 170.055, RSMo 1969, as amended for the purpose of purchasing textbooks to be loaned to pupils or teachers of the sectarian, church-related or religion oriented classes mentioned in paragraphs 5 and 6 of this decree.

8. Textbooks purchased by school boards and delivered to such boards or non-public schools or pupils prior to August 27, 1974, whether paid for or not, shall be released to or remain available for use and retention by pupils of non-public schools, but shall be plainly stamped as the property of the school board involved. Such books shall be returned or purchased as hereinafter provided.

9. Textbooks purchased by school boards and delivered to such boards, private schools or pupils prior to August 27, 1974, for free loan to pupils of the sectarian, church-related or religion oriented class mentioned in paragraph 6 of this decree shall be returned to the school boards on or before June 30, 1975, unless purchased earlier as herein provided. On February 1, 1975, each school board in districts where pupils of non-public schools have textbooks belonging to the school board shall offer for sale in a bulk or single lot all of such textbooks. The non-public school shall have the first option to purchase said books. The terms, price and conditions of sale shall be as follows:

> Textbooks with a copyright date of 1970 or earlier, 10% of invoice price at date of purchase from the publisher plus transportation charges; textbooks with a copyright date of 1971, 15% of invoice price at date of purchase from the publisher plus transportation charges; textbooks with a copyright date of 1972, 20% of invoice price at date of purchase from the publisher plus transportation charges; textbooks with a copyright date of 1973, 25% of invoice price at date of purchase from the publisher plus transportation charges; and textbooks with a copyright date of 1974, 50% of invoice price at date of purchase from the publisher plus transportation charges.

If the non-public school fails to buy such books by cash payment on February

1, 1975, the school boards shall order the return no later than June 30, 1975, of all textbooks loaned or in the hands of such non-public schools or pupils, and shall thereafter use or dispose of such books in the manner provided by law.

Funds realized from the sale of such books shall be turned to the free textbook fund or held for free textbook fund uses and no other.

10. All motions of all parties not heretofore ruled on are overruled and denied.

11. The rulings on plaintiffs' amended petition control the cross-claim of defendants Tussey, et al. and the counterclaim of intervenor-defendants Reynolds, et al.,and such cross-claim and counterclaim are dismissed.

12. All relief requested by any party is denied to the extent that it is not granted or incorporated in this decree.

13. The defendant-intervenor Danforth, Attorney-General, with the cooperation of the Missouri Commissioner of Education will cause all public school Boards and non-public schools throughout the State of Missouri to be notified of the entry of this decree by mailing or causing to be mailed a single copy thereof to the principal office of each such school board or non-public school.

14. Each party hereto will bear his own costs.

Entered at Clayton, Missouri, this 30th day of August, 1974.

Orville Richardson
Circuit Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-646

JOSEPHUS REYNOLDS, et al.,
Petitioners,

vs.

ROBERT W. PASTER, etc., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO "PETITION FOR WRIT OF CERTIORARI"

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Come now respondents Robert W. Paster, Phillip J. Paster, James M. Hornback and James F. Hornback, plaintiffs in the original action before the St. Louis County, Missouri Circuit Court and successful appellants before the Missouri Supreme Court, and pursuant to Rule 24 of this Honorable Court file this, their "Brief" in opposition to the granting of a writ of certiorari in this cause.

ARGUMENT

It should be noted from the outset that considerations governing the review of a writ of certiorari, as herein sought by petitioners, are delineated in Rule 19 of this Honorable Court. The parameters of said rule are neither met nor even approached, directly or indirectly, by the recent ruling of the Supreme Court of Missouri in *Paster*, etc., et al. v. *Tussey*, et al., 512 S.W.2d 97 (Mo. 1974). (Appendix B to petitioners' "Petition for Writ of Certiorari to the Supreme Court of Missouri" [P.W.C.], pp. A25-A62).

The decision of the Missouri Supreme Court did not decide any federal questions, much less federal questions of substance. In fact, the Missouri Supreme Court was extremely circumspect in avoiding involvement with federal constitutional questions and based their decision exclusively and intentionally upon interpretation and construction of the Missouri State Constitution (1945). These interpretations and constructions are those as formulated by the highest judicial body of the State of Missouri. (Missouri Constitution [1945], Article V, Section 2).

Both of petitioners' "Questions Presented" (P.W.C. p. 4) are based upon two erroneous premises. The first such premise upon which petitioners heavily rely throughout is that under the Missouri Supreme Court's ruling, "Children of non-sectarian, nonpublic schools are eligible." (P.W.C. p. 17). In total reliance upon this thesis, petitioners have attempted to fabricate two interdependent theories of relief, based upon a tortured construction of the first and fourteenth amendments to the federal constitution.

Those portions of the "Missouri Textbook Law", Section 170.051, Revised Statutes of Missouri (1973) (P.W.C. pp. 6-8) voided by the Missouri Supreme Court resulted in the elimination of the loan of textbooks to all nonpublic school

pupils; because some of said nonpublic school pupil recipients were of a denominational and sectarian nature, thereby violating the Missouri Constitution (1945). The Missouri Supreme Court did not, as petitioners contend, vitiate only textbook loans to sectarian affiliated nonpublic pupils, while permitting the continuing loan of textbooks to nonsectarian nonpublic pupils. The language of the court in this regard is unequivocal and applies to all nonpublic teachers and pupils, not merely those with a sectarian affiliation.

> "1. That portion of Section 170.051, subpara. 4, requiring public school boards to provide textbooks to teachers in *private schools* 'upon their request' is violative of Art. I, Section 6 of the Missouri Constitution . . .
>
> 2. Those portions of Section 170.051 requiring public school boards to provide textbooks to pupils attending *private schools* are violative of Art. IX, Section 8, of the Missouri Constitution . . ." (Emphasis supplied). (512 S.W.2d at p. 104). (P.W.C. p. A43).

Even assuming the Missouri Supreme Court had, in fact, only prohibited the loan of textbooks to sectarian affiliated nonpublic pupils, such ruling would nevertheless fully conform to federal constitutional standards, in accord with recent decisions of this Honorable Court as more expansively discussed, *infra*.

Two separate and recent cases resolutely decide the issues raised by petitioners. Both cases not only arose within Missouri but dealt with the Missouri constitutional provisions here involved. These cases, both cited by petitioners, are *Brusca*, et al. v. *State of Missouri* ex rel. *State Board of Education*, et al., 332 F.Supp. 275 (E.D.Mo. 1971), *affirmed*, 405 U.S. 1050 (1972), and *Luetkemeyer*, et al. v. *Kaufmann*, et al., 364 F. Supp. 376 (W.D.Mo. 1973), *affirmed*, — U.S. — (1974), 43 L.W. 3230 (Oct. 21, 1974).

Petitioners' second fallacious premise is to have chosen for dual reasons to discount these binding, analogous and applicable decisions because in petitioners' words,

> "Unlike *Brusca* and *Luetkemeyer*, here we are dealing with the withdrawal of legislatively granted services.
>
> This court summarily disposed of *Brusca* and *Luetkemeyer*. Thus they are a very limited guidance to the states as they deal with the complex problems of preserving Free Exercise while avoiding Establishment." (P.W.C. p. 14).

The fact that *Brusca, supra,* and *Luetkemeyer, supra,* concerned state practices which accorded public schools and pupils greater services and state supported benefits than those accorded nonpublic schools and pupils, while this cause involves identical differences operating under authority of state constitutional provision, as opposed to mere practice, is not a legally valid distinction. Nonlegislative acts and acts under color of state law or constitution have always been subject to and held equally accountable under federal constitutional standards. State legislative or constitutional imprimatur have never allowed a lesser application of federal constitutional muster and review.

Secondly, petitioners draw an unwarranted conclusion from this Honorable Court's affirmances in *Brusca, supra,* and *Leutkemeyer, supra.* Petitioners argue that such summary affirmances offer little precedence here; an argument that totally ignores the lengthy and well-reasoned, affirmed decisions by the respective three judge panels in those cases at the district court level. The action by this Honorable Court in *Brusca, supra,* and *Leutkemeyer, supra,* is much more an indication of the total lack of federal question substance as regards petitioners' arguments than it is an indication of slight precedential value, as argued by petitioners.

The court in *Brusca, supra,* was specifically faced with the question of whether or not Article IX, Section 8 of the Missouri

Constitution (1945) (P.W.C. pp. 5-6) in its application violated the first and fourteenth amendments to the federal constitution. The panel unanimously held it did not.

> "By their State Constitution, the people of Missouri have decided that they will not permit the use of state funds, directly or indirectly, in aid of religion or religious institutions. These provisions expressing the public policy of Missouri, are a bar to any financial assistance to plaintiffs unless they are held violative of either the Free Exercise Clause of the First Amendment or the Equal Protection guaranty of the Fourteenth Amendment.
>
> . . . a parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education.[2]
>
> [2] . . . Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060, held no more than that a state may, *not that it must*, adopt a program for the purpose of furthering educational opportunities for the young under which secular textbooks are loaned free of charge to children attending parochial and other private schools." (332 F.Supp. at p. 277).

"Faced with this decision, plaintiffs now argue that some alternative program, such as tuition grants, could conceivably be devised which, so they contend, would be free of government entanglement. Wholly apart from the fact that 'entanglement' comparable to that described in *Lemon* cannot realistically be avoided if plaintiffs are granted aid for parochial school purposes, particularly on a continuing basis, if is self-evident that both the purpose and effect of any statute appropriating tax-raised funds to assist parents in the 'free exercise of their religion' would necessarily be to support religion." (332 F.Supp. at p. 278).

"Plaintiffs further contend that the provisions of the Missouri Constitution and statutes which limit the use of tax-

raised funds to the State's public schools are violative of the Equal Protection Clause of the Fourteenth Amendment. We do not agree.

We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination exists, the courts may not interfere." (332 F.Supp. at p. 279).

While *Brusca, supra,* dealt generally with the granting of equal aid and support across the board to nonpublic school pupils and parents, *Luetkemeyer, supra,* dealt specifically with the singular issue of busing. The court in *Luetkemeyer, supra,* had little difficulty in disposing of the plaintiffs' arguments of "child benefit," equal protection and due process; the same arguments advanced here by petitioners.

"The 'child benefit' theory must be considered in the context of the cases which required the Court to define permissible areas of State aid to religious institutions. The language of those cases may not be taken out of context to support the notion that a State *must* provide transportation for all pupils, regardless of whether they attend a religious or public school. We do not suggest that the fact that state benefits are distributed to children rather than to schools, and the fact that the benefit is essentially non-religious in character may not be relevant in regard to proper analysis of other constitutional questions presented in this case; we conclude only that the 'child benefit theory,' as set out in *Everson* and *Allen,* standing alone, does not support plaintiffs' basic contention.

. . .

Plaintiffs contend that the transportation of school children is part of a comprehensive statutory and regulatory scheme designed to provide for the safety and welfare of

children traveling to and from school. Plaintiffs argue that the fact that this public service is denied to the plaintiff children solely because they are enrolled in a nonpublic school 'is an arbitrary and unreasonable classification and unconstitutionally denies plaintiffs equal protection of the laws' as prohibited by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs argue further that the classification involved is invidious because it infringes upon plaintiffs' fundamental right to select the school of their choice and to freely exercise their religion and that, therefore, a compelling state interest must be shown to justify the classification.

. . .

If one's right to a public school education is not within the protection of the Constitution, certainly it cannot be said that one has a federally protected constitutional right to a parochial school education, nor a federally protected constitutional right to receive free public transportation to and from parochial schools." (364 F.Supp. at pp. 381-382).

"We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power,' . . .

That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an 'interest of the highest order' within the meaning of *Yoder* and within the meaning of all the other vari-

ous descriptive terms set forth in United States v. O'Brien above quoted.

> *The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question.* The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter." (Emphasis supplied). (364 F.Supp. at p. 386).

As this Honorable Court has held, "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970).

In 1947 this Honorable Court unanimously applied the first amendment religion clauses to the states, via the fourteenth amendment and in a five to four ruling went on to hold that public state funds could be utilized to provide bus transportation of children to nonpublic schools. *Everson* v. *Board of Education*, et al., 330 U.S. 1 (1947). Six years later the Missouri Supreme Court in an unanimous decision held that the public busing of nonpublic school pupils violated the Missouri Constitution (1945). *McVey*, et al. v. *Hawkins*, et al., 258 S.W. 2d 927 (Mo. 1953).

Although this Honorable Court has sustained the textbook loan program of the state of New York under federal constitutional provisions (*Board of Education of Central School District No. 1*, et al. v. *Allen*, et al., 392 U.S. 236 [1968]), the Missouri Supreme Court has found the statute herein challenged to violate the state constitutional mandates. In fact, on each and every occasion prior to this cause, the Missouri Supreme Court has,

without exception, unanimously prohibited the use of public funds for nonpublic education. (See, *Harfst*, et al. v. *Hoegen*, et al., 163 S.W.2d 609 [Mo. 1942]; *Berghorn*, et al. v. *Reorganized School District No. 8, Franklin County*, et al., 260 S.W.2d 573 [Mo. 1953]; *McVey*, et al. v. *Hawkins*, et al., 258 S.W.2d 927 [Mo. 1953]; and *The Special District for the Education and Training of Handicapped Children of St. Louis County, Missouri* v. *Wheeler*, et al., 408 S.W.2d 60 [Mo. 1966]).

Allen, supra, while appearing at first glance to be relevant to the case at bar, is not and closer examination reveals its distinguishing features.

Allen differs from the present case in many important aspects. First are statutory variances. The New York statute in *Allen* (N.Y. Education Law, Section 701 [1967 Supp.]) provided that the books to be "loaned" "shall be textbooks which are designated for use in any public schools of the state . . . or are approved by . . . (public) school authorities" and the "loans" were made only to *children* enrolled in public or private schools. Distinctively and critically different was Section 170.051, R.S. Mo. (1972), which provided "loans" free to pupils *and teachers* and did not require that the books be presently used in the public schools or receive prior approval and/or inspection by any public school or other public authorities. The statute merely contained the perfunctory prohibition that "(n)o textbooks shall be purchased or loaned under this section *to be used* in any form of religious instruction or worship" (emphasis supplied), and was void of enforcement authority or machinery. It was hardly sufficient in view of human nature, common experience and the *Allen* experience, described *infra*, to assume blithely that public school boards would not purchase books with impermissible content, when the statute, *per se*, did not prohibit such purchases and funds for enforcement were not provided. Instead the statute was a simple mandate that the public school board "shall purchase and loan" whatever books were requested, which was

coupled with a simple prohibition that such textbooks were not "to be used in any form of religious instruction or worship." (Section 170.051, subsections 2 and 6, R.S. Mo. [1972]).

Secondly, the "entanglement" test originated by the Supreme Court in *Walz, supra,* at page 674 and deemed so singularly important in *Lemon* et al. *Kurtzman,* 403 U.S. 602 (1971), was post-*Allen* and therefore not a consideration in that landmark decision. The Supreme Court in deciding *Allen, supra,* took great pains to note that,

> "Books are furnished at the *request of the pupil* and ownership remains, at least technically, in the State. Thus, no funds or books are furnished to parochial schools, and the *financial benefit is to parents and children, not to schools.* * * * Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." (Emphasis supplied.) 392 U.S. at pp. 243-245.

The Supreme Court in *Lemon, supra,* noted,

> "This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that *state aid was provided to the student and his parents*—not to the church-related school." (Emphasis supplied.) 403 U.S. at p. 621.

Surely, the non-public school teacher is but a natural instrument and an extension of the employing non-public school and cannot be considered as being synonymous with the student and his parents.

It is these very differences in the challenged Missouri statutes: to-wit, providing textbooks at the request of non-public school *teachers* (Section 170.051, subsection 4, R.S. Mo. [1972]), and the mere prohibition against the use of such textbooks in any

form of religious instruction or worship; that manifestly on their face violated the entanglement proscription of *Lemon, supra.* Not only was direct aid to non-public school teachers afforded but the state could have insured conformity of loaned textbook utilization within the statutory restriction, only through on-site inspections of non-public school practices, teachings and curriculum, thereby, necessarily engaging in the very entanglement proscribed.

The Supreme Court in *Lemon, supra,* in discussing its finding of entanglement, stated,

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. * * * These prophylactic contacts will involve excessive and enduring entanglement between state and church. * * * we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." 403 U.S. at pp. 619-620.

The United States Sixth Circuit Court of Appeals in *Protestants and Other Americans United for Separation of Church and State,* et al. v. *United States,* et al., 435 F.2d 627 (6th Cir. 1970), *cert. denied,* post-*Lemon,* 403 U.S. 955 (1971) made note of the distinctions discussed above between grants which financially assist the private educational system (teachers) and grants to students. (*Id.* at 629). Moreover, the Court in that case strictly limited the applicability of the *Allen* case to its specific facts and, indeed, cast serious doubts on the continued validity of *Allen, supra,* by emphasizing the fact that the entanglement test had not been established when the *Allen* case was decided. (*Id.* at 629)).

Thirdly, the New York Constitution, Article XI, Section 3, at issue in *Allen, supra,* was not comparable to the numerous

and varied constitutional provisions of the Missouri Constitution, violated by the challenged statutes and set out in part, *supra*, under "Constitutional and Statutory Provisions Involved." (P. W. C. pp. 5-6). Lastly, it was noted in the *Allen* decision that nothing had been shown in the record contrary to the stated purpose of the statute. (392 U.S. at p. 243). The Missouri statutes contained no such stated purpose.

Last is the tragic failure of the *Allen* statute in practice, as best related in an article entitled, "Sectarian Books, The Supreme Court and the Establishment Clause," 79 *Yale Law Journal* 111 (Nov. 1969).

In unequivocal terms this Honorable Court, speaking through Chief Justice Burger, stated,

> "A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expenses is borne by the State, the economic consequence is to give aid to the enterprise;" (*Norwood*, et al. v. *Harrison*, et al., 413 U.S. 455, 463-464 [1973]).

Petitioners frequently refer to the allegation that prior to the challenged statute's enactment, "all petitioners paid for their own textbooks" (P.W.C. p. 10; see, also, p. 18). This is simply not true. Petitioners' own witness, plaintiff Dora Fine, testified that the textbooks for her children attending a sectarian nonpublic school are provided free of charge by the school. (Transcript page 221, lines 19-24).

Petitioners consistently choose to ignore the basic freedom of choice with which they are presented: A free non-sectarian public education or a sectarian private education in regard to which the state has scrupulously avoided supporting. Having chosen the latter, petitioners can not equitably demand all the benefits of the former.

The consistent post-*Allen, supra,* retrenchment by this Honorable Court, the absence under the challenged statute of prior approval of textbook loans, the consequential necessity of on-site inspection and review to ensure statutory compliance, the necessitated creation of undue entanglement between government and religion as formulated post-*Allen, supra,* in *Walz, supra,* and the second poisoned prong of entanglement, political divisiveness, as enunciated by the Honorable Court in *Lemon, supra,* all heavily weigh against the improvident granting of a writ of certiorari, as herein sought by petitioners.

Wherefore, respondents respectfully pray that petitioners' "Petition for Writ of Certiorari to the Supreme Court of Missouri" be denied forthwith.

Respectfully submitted

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